



For a thriving New England

CLF New Hampshire 27 North Main Street
Concord, NH 03301
P: 603.225.3060
F: 603.225.3059
www.clf.org

September 16, 2016

James M. Colby, President
Colby Lumber Co., Inc.
270 High St.
Boscawen, NH 03303

Joseph G. Colby, Registered Agent
Colby Lumber Co., Inc.
270 High St.
Boscawen, NH 03303

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation ("CLF")¹ hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act ("Clean Water Act," "CWA," or "Act"), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., Part 135 (the "Notice") to the addressed persons of CLF's intention to file suit in United States District Court of the District of New Hampshire seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is twofold. First, Colby Lumber Co., Inc. (hereinafter "Colby Lumber") is discharging stormwater directly associated with the timber products facility at 270 High St., Boscawen, NH 03303 (the "Facility"), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, Colby Lumber has failed to obtain coverage under any Clean Water Act permit including the Multi-Sector General Permit² ("MSGP") adopted by the United States Environmental Protection Agency ("EPA") for

¹ CLF is a not-for-profit 501(C)(3) organization dedicated to the conservation and protection of New England's environment. Its mission includes the conservation and protection of the many uses of the waters in and around the Merrimack River watershed for, among other things, fishing, recreation, boating, scenic/aesthetic, and scientific purposes. CLF's membership includes people who live in or near the Merrimack River watershed, and use and enjoy the watershed for recreational, aesthetic, and/or scientific purposes. The interests of CLF's members are adversely affected by the Facility's discharges of stormwater pollution to the receiving waters without a permit and in violation of the Clean Water Act.

² ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP)

industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of Sections 402(p)(3)(A) and 402(p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1). In addition, to the extent that Colby Lumber uses water in its industrial processes, Colby Lumber has failed to obtain individual National Pollutant Discharge Elimination System (“NPDES”) permit coverage for the Facility’s process water discharges.

BACKGROUND

Tannery Brook is a waterbody in the Merrimack River watershed. Colby Lumber discharges into Tannery Brook at Waterbody Segment NRIV700060102-06. Tannery Brook (Segment NRIV700060102-06) flows downstream into Segment NRIV700060102-07, which then flows into the Merrimack River (Segment NHRIV700060102-15). EPA has designated Tannery Brook (Segments NRIV700060102-06 and NRIV700060102-07) as a habitat for “aquatic life harvesting,” “fish, shellfish, and wildlife protection and propagation,” the public water supply, and recreation.³⁴ EPA has designated the Merrimack River (Segment NHRIV700060102-15) as a habitat for “aquatic life harvesting,” the public water supply, and recreation.⁵ The use of these waterbodies for other purposes remains unassessed at this time.

EPA has designated Tannery Brook (Segment NRIV700060102-06) as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.⁶ Segment NRIV700060102-06 is impaired for mercury. Stormwater is a probable source of impairments in Segment NRIV700060102-06.⁷

EPA has designated the downstream segment of Tannery Brook (Segment NRIV700060102-07) as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet

(June 5, 2015), https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_finalpermit.pdf [hereinafter MSGP].

³ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR TANNERY BROOK (SEGMENT ID NRIV700060102-06) (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV700060102-06&p_list_id=NHRIV700060102-06&p_cycle=2012.

⁴ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR TANNERY BROOK (SEGMENT ID NRIV700060102-07) (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV700060102-07&p_list_id=NHRIV700060102-07&p_cycle=2012.

⁵ See U.S. ENVTL. PROTECTION AGENCY, 2012 WATERBODY REPORT FOR THE MERRIMACK RIVER (SEGMENT ID NHRIV700060102-15) (2012), https://ofmpub.epa.gov/waters10/attains_waterbody.control?p_au_id=NHRIV700060102-15&p_cycle=2012.

⁶ See 33 U.S.C. § 1313(d).

⁷ See U.S. ENVTL. PROTECTION AGENCY, *supra* note 3.

minimum water quality standards.⁸ Segment NRIV700060102-07 is impaired for pathogens (*Escherichia coli*, or *E. coli*), mercury, and pH/acidity/caustic conditions. Stormwater is a probable source of impairments in Segment NRIV700060102-07.⁹

EPA has designated the Merrimack River (Segment NHRIV700060102-15) as impaired pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), for failure to meet minimum water quality standards.¹⁰ Segment NHRIV700060102-15 is impaired for mercury. Stormwater is a probable source of impairments in Segment NHRIV700060102-15.¹¹

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.¹² Industrial activities, such as material handling and storage, equipment maintenance and cleaning, industrial processing, and other operations that occur at industrial facilities, may be exposed to stormwater.¹³ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.¹⁴

Colby Lumber is required to apply for coverage under a Clean Water Act discharge permit—such as the MSGP—in order to discharge lawfully. Since at least 2010, Colby Lumber has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent (“NOI”) within 90 days after the initial issuance of the MSGP.¹⁵ On June 16, 2015, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2015 permit.

Colby Lumber has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, Colby Lumber is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

⁸ See 33 U.S.C. § 1313(d).

⁹ See U.S. ENVTL. PROTECTION AGENCY, *supra* note 4.

¹⁰ See 33 U.S.C. § 1313(d).

¹¹ See U.S. ENVTL. PROTECTION AGENCY, *supra* note 5.

¹² See 40 C.F.R. § 122.26(b)(13).

¹³ See 40 C.F.R. § 122.26(b)(14).

¹⁴ See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

¹⁵ EPA’s Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995 and later reissued in 2000, 2008, and 2015. See 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); 73 Fed. Reg. 56,572 (Sept. 29, 2008); 80 Fed. Reg. 34,403 (June 16, 2015); *see also* MSGP, *supra* note 2, at pts. 1.1–1.2.

Colby Lumber Co., Inc. is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Colby Lumber has operated the Facility since at least 1998 and currently advertises as the operator of the Facility.¹⁶ Colby Lumber and its agents and Directors—including but not limited to James M. Colby, President—have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the Clean Water Act.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the timber products facility located at 270 High St., Boscawen, NH 03303.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Colby Lumber has engaged, and continues to engage, in “industrial activities” and its operations fall under SIC code prefix 24, within the meaning of 40 C.F.R. § 122.26(b)(14).¹⁷ Because the Facility engages in industrial activity identified by the SIC code prefix 24 (including but not limited to 2421: general sawmills and planing mills; 2491: wood preserving; 2411: log storage and handling; 2426: hardwood dimension and flooring mills; 2429: special product sawmills, not elsewhere classified; and 2499: wood products, not elsewhere classified) and discharges stormwater associated with industrial activity, Colby Lumber is required to apply for, obtain coverage under, and comply with the requirements of a NPDES permit such as the MSGP. Colby Lumber has failed to take any of these required steps.

Activities at the Facility include, but are not limited to: buying, producing, processing, storing and selling logs, mulch, bark, firewood, flooring, furniture grade hardwood, wood chips, clean mill chips; the purchase, collection, processing and outdoor storage of bark, wood chips and mulch; the operation and storage of industrial equipment; and driving vehicles on and off the Facility, thereby tracking pollutants off-site. The Facility’s outdoor material piles contain, but are not limited to: large amounts of logs, wood, mulch, sawdust and earth products. All of these activities at the Facility have contaminated the site with industrial pollutants.

Piles of logs, wood, mulch, sawdust, sawmill products, waste, interior access roads, vehicles and heavy equipment, and material processing and handling areas at the Facility are exposed to

¹⁶ See NEW HAMPSHIRE DEP’T OF STATE CORP. DIV., COLBY LUMBER CO., INC., <https://www.sos.nh.gov/corporate/soskb/Corp.asp?355758> (last visited September 15, 2016).

¹⁷ See MSGP, *supra* note 2, at appen. D, Table D-1, Sector A (specifying that timber products facilities identified by the SIC code prefix 24—including but not limited to 2421: general sawmills and planing mills; 2491: wood preserving; 2411: log storage and handling; 2426: hardwood dimension and flooring mills; 2429: special product sawmills, not elsewhere classified; and 2499: wood products, not elsewhere classified—are subject to the requirements of the MSGP for stormwater discharges).

precipitation and snowmelt. Precipitation falls on and flows over the industrial materials and areas, picking up bark and wood debris, total suspended solids (TSS), leachates (which can contain high levels of TSS and biochemical oxygen demand, also known as BOD), oil, grease, metals, solvents, acids, nutrients, pathogens, dissolved solids, trash, fuel and other pollutants associated with the Facility's operations. The polluted runoff is then conveyed off-site into waters of the United States.

In addition, to the extent that Colby Lumber uses water in its industrial processes, including but not limited to washing or spraying piles of logs, wood, mulch, sawdust, and earth products, that water becomes "process wastewater" (also referred to as "process water") as defined in 40 C.F.R. § 122.2.¹⁸ Discharges of process wastewater are not covered under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity. Instead, discharges of process wastewater must be covered under an individual NPDES permit. To the extent that the Facility discharges process water, CLF intends to pursue claims related to Colby Lumber's unpermitted discharges of process water to waters of the United States.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹⁹ Colby Lumber discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its Facility into waters of the United States. Because Colby Lumber has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater without a permit, in violation of Sections 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).²⁰ By failing to apply for and comply with the specific requirements of the MSGP, Colby Lumber is in violation of Sections 402(p)(3)(A) and 402(p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1). In addition, unpermitted discharges of process wastewater constitute violations of 33 U.S.C. § 1311(a). To the extent that Colby Lumber uses water in its industrial processes, CLF puts Colby Lumber on notice that CLF intends to pursue claims related to Colby Lumber's unpermitted discharges of process wastewater to waters of the United States.

a. Colby Lumber is discharging stormwater to waters of the United States without a permit.

¹⁸ Defining "Process wastewater" as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product."

¹⁹ 33 U.S.C. § 1311(a).

²⁰ See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; see also MSGP, *supra* note 2, at appen. A (defining the term "discharge of a pollutant" as, *inter alia*, "any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source'").

Colby Lumber is an industrial discharger and its operations fall under SIC code prefix 24, which means that pursuant to Section 402(p) of the Act, Colby Lumber is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because Colby Lumber has operated and continues to operate without a permit under Section 402(p), Colby Lumber is in violation of Section 301(a) of the Act.

In addition, during storm events, Colby Lumber's "industrial activities" at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches.²¹ There have been many such storm events since 2010. The Facility is generating pollutants from and through at least the following point sources: piles of logs, wood, mulch, sawdust, earth products, and other materials that are open to the elements; the machines and equipment left outdoors; the vehicles driving on and off the Facility, while additionally conveying pollutants through site grading, surface water channels, subsurface hydrological connections, detention ponds, culverts, and other conveyances to Tannery Brook.²² Downstream reaches of Tannery Brook flow and outlet into the Merrimack River, and thereafter into the Atlantic Ocean. All of the aforementioned waterbodies are "waters of the United States," as defined in 40 C.F.R. § 122.2, and therefore, "navigable waters," as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

b. Colby Lumber is discharging process water to waters of the United States without a permit.

Wastewater associated with industrial processes, including, but not limited to, washing materials and paved surfaces and spraying machinery, is classified as "process wastewater" under the federal Clean Water Act and as defined in 40 C.F.R. § 122.2. Wastewater produced by washing materials and paved surfaces and spraying machinery can contain a variety of pollutants, including detergents, oil, grease, heavy metals, and other pollutants associated with the Facility's operations. In addition, solids suspended or dissolved in washwater can pollute ground and surface waters. Process wastewater can have severe and long-term impacts on aquatic environments.

²¹ See 40 C.F.R. § 122.26(c)(i)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

²² These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. Therefore, CLF puts Colby Lumber on notice that the unpermitted stormwater discharges associated with industrial activity include discharges from the Facility areas specified in 40 C.F.R. § 122.26(b)(14). See also 40 C.F.R. § 122.2 (stating that the definition of "discharge of a pollutant" "includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man[.]").

Discharges of process water that result from washing materials and paved surfaces and spraying machinery are not covered under the MSGP. Discharges of process wastewater must instead be covered under an individual NPDES permit. To the extent that Colby Lumber uses water in its industrial processes, Colby Lumber does not have an individual NPDES permit authorizing the discharge of process wastewater to waters of the United States. CLF intends to pursue claims related to Colby Lumber's unpermitted discharges of process water to waters of the United States, namely Tannery Brook and the Merrimack River.

c. Colby Lumber is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

Colby Lumber is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.²³ The Facility has a primary SIC code prefix 24 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.²⁴ Colby Lumber's failure to obtain coverage and comply with the permit is in violation of the MSGP and Section 402, 33 U.S.C. § 1342(p) of the Clean Water Act.²⁵

1) Colby Lumber Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).

As a prerequisite to applying for coverage under the MSGP, Colby Lumber must develop and implement a Stormwater Pollution Prevention Plan ("SWPPP").²⁶ The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.²⁷ Colby Lumber has failed to develop and implement a SWPPP in accordance with the MSGP requirements in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

2) Colby Lumber Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.

²³ See MSGP, *supra* note 2, at pts. 1.1–1.2.

²⁴ *Id.* at pts. 1.1, 8.A.

²⁵ A thorough search of EPA's databases indicates that Colby Lumber has not filed an NOI for the Facility.

²⁶ See MSGP, *supra* note 2, at pt. 5.

²⁷ *Id.* at pt. 5.2.

To be eligible to discharge under the MSGP, Colby Lumber must submit a complete Notice of Intent (“NOI”) to the EPA.²⁸ To complete the NOI, Colby Lumber is required to determine whether the body of water to which the stormwater discharges is an “impaired” water body, and whether the Facility discharges any specific pollutants listed on the NOI to that water body.²⁹ Tannery Brook (including Segments NRIV700060102-06 and NRIV700060102-07) is classified as an “impaired” water.³⁰ Additionally, as part of preparing the NOI, the covered Facility must make certain verifications such as ensuring that no harm is done to a species in violation of the Endangered Species Act.³¹ Colby Lumber has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) Colby Lumber Must Take Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, Colby Lumber must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. Colby Lumber must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.³² These control practices must be in accordance with good engineering practices and manufacturer’s specifications.³³ If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.³⁴ Colby Lumber has failed to cover the materials and operations that may result in polluted stormwater runoff. Colby Lumber has not implemented the required control measures in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

4) Colby Lumber Must Conduct Routine Facility Inspections.

To be eligible to discharge under the MSGP, Colby Lumber must conduct routine inspections of all areas of the Facility where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.³⁵ Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.³⁶ These inspections must occur when the Facility is in

²⁸ *Id.* at pt. 1.2.

²⁹ *Id.* at pt. 2.2.2.

³⁰ *See supra* notes 3–4.

³¹ *See* MSGP, *supra* note 2, at pts. 1.1.4.5, 2.3.

³² *Id.* at pt. 2.1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at pt. 3.1.

³⁶ *Id.*

operation.³⁷ The schedule of these inspections must be included in the Facility's SWPPP and be performed by qualified personnel.³⁸ Colby Lumber has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

5) Colby Lumber Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, Colby Lumber must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.³⁹ The MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.⁴⁰ An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.⁴¹ Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.⁴² All monitoring data collected under the Permit must be reported to EPA. Furthermore, because Tannery Brook (including Segments NRIV700060102-06 and NRIV700060102-07) is an "impaired water" under Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), Colby Lumber must monitor for all pollutants for which the Tannery Brook is impaired.⁴³ Colby Lumber has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) Colby Lumber Must Carry Out the Required Reporting and Recordkeeping.

Colby Lumber must maintain and submit any and all required monitoring data.⁴⁴ Such monitoring data includes the following: an annual report to EPA which includes the Facility's findings from the annual comprehensive site inspection and any documentation of corrective actions;⁴⁵ an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;⁴⁶ and any other required reports under the MSGP.⁴⁷ Colby Lumber has failed to maintain the required records and failed to submit all required

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See* MSGP, *supra* note 2, at pt. 6.

⁴⁰ *Id.* at pt. 6.2.

⁴¹ *Id.* at pt. 6.1.1.

⁴² *Id.* at pt. 6.1.3.

⁴³ *Id.* at pt. 6.2.4.

⁴⁴ *Id.* at pt. 7.1.

⁴⁵ *Id.* at pt. 7.5.

⁴⁶ *Id.* at pt. 7.6.

⁴⁷ *Id.* at pt. 7.7.

monitoring data under the MSGP in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

7) Colby Lumber Must Comply with the Requirements of MSGP Subpart 8.A

Colby Lumber must also comply with the sector-specific requirements contained in Subpart A of the MSGP.⁴⁸ Subpart A requires timber product facilities to implement additional technology-based effluent limits,⁴⁹ meet additional SWPPP and inspection requirements,⁵⁰ and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to timber product facilities.⁵¹ Colby Lumber must also minimize contact of stormwater runoff with log, lumber, and wood product storage areas, residue storage areas, loading and unloading and material handling areas, chemical storage areas, and equipment and vehicle maintenance, storage, and repair areas through various control measures such as permanent or semi-permanent covers or roofs, interceptor or diversion controls (e.g., dikes, swales, curbs, or berms); pipe slope drains; subsurface drains; conveyance systems (e.g., channels or gutters, open-top box culverts, and waterbars; rolling dips and road sloping; roadway surface water deflector and culverts); or their equivalents.⁵² Colby Lumber has failed to comply with the requirements of Subpart A of the MSGP in violation of the MSGP and Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which Colby Lumber operates its Facility without permit coverage or discharges stormwater and/or process water without a permit from the Facility is a separate and distinct violation of Sections 301(a) and 402(p)(2)(B) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

Colby Lumber has discharged stormwater without a permit in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), on every day since at least 2010 on which there has been a measurable precipitation event. Each day on which Colby Lumber operates its Facility without permit coverage or discharges process water without a permit from the Facility is a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311(a).

Every day, since at least 2010, on which Colby Lumber has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the CWA, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

⁴⁸ See MSGP, *supra* note 2, at appen. D, Table D-1, Sector A; pt. 8.A.

⁴⁹ *Id.* at pt. 8.A.3.

⁵⁰ *Id.* at pt. 8.A.4.

⁵¹ *Id.* at pt. 8.A.6.

⁵² *Id.* at pt. 8.A.4.3.



These violations are ongoing and continuous, and barring a change in the stormwater management controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Colby Lumber is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Each separate violation of the Act subjects Colby Lumber to a penalty up to \$37,500 per day per violation for all violations occurring from January 12, 2009 through November 2, 2015, and \$51,570 for penalties that are assessed on or after August 1, 2016, for violations that occurred after November 2, 2015.⁵³ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring Colby Lumber to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with this matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

⁵³ See 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. §§ 19.1–19.4.



Sincerely,

A handwritten signature in blue ink, appearing to read "Zachary K. Griefen", is written over a horizontal line.

Zachary K. Griefen, Esq.
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602
(802) 223-5992 x4011
zgriefen@clf.org

cc:

Gina McCarthy
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

H. Curtis Spalding
Environmental Protection Agency
EPA Region 1 Administrator
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Tom Burack, Commissioner
New Hampshire Department of Environmental Services
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095